STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Before: Jansen, P.J., and Meter, and Cooper, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Supreme Court No. 127194
Court of Appeals No. 245012
31st Circuit Court No. A-02-601-FC

vs

JOHN ALBERT GILLIS,
Defendant-Appellee.

_____/

APPELLEE'S BRIEF ON APPEAL

******ORAL ARGUMENT REQUESTED******

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CONCURRENCE IN BASIS OF JURISDICTION

Defendant-Appellee concurs that this Court's jurisdiction to hear this matter is pursuant to Const 1963, art 6 §4 and MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE PLAIN LANGUAGE OF THE FELONY MURDER STATUTE PRECLUDES A CONVICTION FOR FIRST DEGREE MURDER WHEN THE HOMICIDES OCCURRED AFTER COMPLETION OF THE PERPETRATION, OR ATTEMPT TO PERPETRATE, FIRST OR SECOND DEGREE HOME INVASION, AND WHEN THE HOMICIDES OCCURRED AT A SIGNIFICANT REMOVE IN SPACE AND TIME FROM THE LOCUS OF SAID HOME INVASION AND WHEN THE HOMICIDES OCCURRED DURING THE PERPETRATION OF A SUBSEQUENT INTERVENING FLEEING AND ELUDING FELONY?

Defendant-Appellee would answer this question "Yes."

Plaintiff-Appellant answers this question "No."

The Court of Appeals was not presented with this question for review but would have answered "No."

II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S MOTION TO QUASH THE FELONY-MURDER INFORMATION WHEN THE HOMICIDES OCCURED AFTER COMPLETION OF THE PERPETRATION, OR ATTEMPT TO PERPETRATE, FIRST OR SECOND DEGREE HOME INVASION, AND WHEN THE HOMICIDES OCCURRED AT A SIGNIFICANT REMOVE IN SPACE AND TIME FROM THE LOCUS OF SAID HOME INVASION AND WHEN THE HOMICIDES OCCURRED DURING THE PERPETRATION OF A SUBSEQUENT INTERVENING FLEEING AND ELUDING FELONY?

Defendant-Appellee would answer this question "yes."

Plaintiff-Appellant answers this question "No."

The Court of Appeals answered this question "yes."

III. WHETHER THE TRIAL COURT REVERSIBLY ERRED BY DETERMING THAT A JURY INSTRUCTION ON THE INFERIOR-OFFENSE OF INVOLUNTARY MANSLAUGHTER WAS NOT SUPPORTED BY A RATIONAL VIEW OF THE EVIDENCE AND BY GIVING A SPECIAL INSTRUCTION ON ESCAPE THAT WAS MISLEADING?

Defendant-Appellee would answer this question "Yes."

Plaintiff-Appellant answers this question "No."

The Court of Appeals answered this question "Yes."

IV. WHETHER THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF DEFENDANT'S PRIOR CONVICTION FOR FLEEING AND ELUDING UNDER MRE 404(b) BECAUSE THE CONVICTION WAS INTRODUCED IN THE PEOPLE'S CASE IN CHIEF WHERE DEFENDANT DID NOT TESTIFY FOR THE SOLE PURPOSE TO PROVE THAT THE DEFENDANT ACTED IN CONFORMITY THEREWITH?

Plaintiff-Appellant answers this question "YES."

Defendant-Appellee would answer this question "no."

The court of appeals answers this question "no."

V. WHETHER THE COURT OF APPEALS, UNDER THE SEPARATION OF POWERS DOCTRINE, AND BASED ON THE FACTS OF THIS CASE, HAD THE AUTHORITY TO REMAND THIS CASE WITH INSTRUCTION TO RETRY THE MATTER ON CHARGES OF SECOND DEGREE MURDER AND FLEEING AND ELUDING?

Defendant-Appellee answers this question "Yes."

Plaintiff-Appellant answers this question "No."

The Court of Appeals was not presented with this question for review but would answer the question "Yes", as evidenced by their ruling on page 4 of the August 17, 2004 Unpublished Per Curiam Opinion.

COUNTER-STATEMENT OF FACTS

Defendant-Appellee (Defendant hereafter) essentially relies on the statement of facts set forth in his Brief on Appeal to the Court of Appeals and the factual summary contained in the August 17, 2004, Unpublished Per Curiam Opinion of the Michigan Court of Appeals in this case, in order to provide the following counter-statement of facts.

Summary of Events.

Defendant, John Gillis, was charged with two counts of first-degree felony-murder pursuant to MCLA 750.316, in the May 24, 2001, automobile deaths of Nicholas and Gayle Ackerman.

At a point in time between 1:00 pm and 2:00 pm on this date, Defendant drove his white Dodge Shadow into the driveway of the residence located at 4151 Mayer, East China Township, in St. Clair County, then owned by Steven Albright.[1] Mr. Albright observed an unfamiliar vehicle in his driveway, heard a loud noise near his garage and immediately investigated.[2] Defendant had completed a home invasion of Albright's residence on this date and time by entering Albright's garage and opening a door from the garage to a sun room or mud room. At no point in the home invasion, however, did Gillis enter Mr. Albright's actual residence. Rather, Gillis remained on the stoop of the garage door.[3]

Within moments of the invasion, the homeowner visually and verbally confronted Gillis when Defendant opened the steel garage door leading from the garage door into the small sunroom near the kitchen of Albright's home. When asked by Mr. Albright, "what the fuck are

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[1] Appellant's Appendix, p. 45a, Appellee's Appendix, p. 1b
[2] Id., at pp. 46a – 48a.
[3] Appellee's Appendix, at p. 27b

you doing?", Defendant replied, "nothing",[4] quietly closed the garage door and quickly retreated to his vehicle and drove away.[5]

Mr. Albright retrieved his .9 millimeter handgun, went outside his home to his driveway, and commanded Defendant to stop as he entered his vehicle and began pulling out of Albright's driveway.[6] Defendant drove north on Mayer Rd. from Albright's home toward the St. Clair Highway.[7]

Realizing that Defendant was able to drive away from his property, Mr. Albright went back into his home, tossed his handgun into his living room, retrieved a cordless phone and dialed 911 while going to his garage and getting into his vehicle. Mr. Albright provided 911 with a description of Defendant and his vehicle. Albright decided to "[go] after him [Defendant] to see if I could find him...".[8]

Mr. Albright got into his car and drove around his block in the same direction he observed Defendant drive on Mayer Rd., but he did not see Defendant or anyone else on any of the roads he traveled.[9] Albright was never in pursuit of Gillis by vehicle because he had no idea where Defendant had gone, as indicated in his testimony provided on direct examination at the evidentiary hearing conducted on June 21, 2002, pursuant to Defendant's motion to quash the information on the felony murder charge:

> Q [by the Prosecutor] Were you able to see him when you got out to the road?
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> A No, because there was too many different areas. I got to this intersection right here, Puttygut and Mayer, and I thought, well, it's pretty much a turkey shoot. I don't know which way, so I'll just go right. So I went

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[4] Appellant's Appendix at pp. 49a, 50a
[5] Id., at pp. 49a – 53a
[6] Id., at pp. 52a, 53a
[7] Id., at pp. 56a, 58a
[8] Id., at p. 55a, brackets supplied
[9] Appellee's Appendix at p. 30b

> right and I went down this way, and then I came up Westrick back to St. Clair Highway.[10]

The last time Albright saw the Defendant was when Albright was on foot, in his socks, as Defendant was pulling away from his home, heading North down Mayer Rd. He did not see Defendant again until the June 21, 2002, hearing in the trial court, some 13-months later.[11]

He returned to his home from his search in approximately five minutes, calling 911 a second time to add detail to the description of Defendant's vehicle.[12] A few minutes after this second call to 911, a St. Clair County Deputy Sheriff arrived at Mr. Albright's home. Mr. Albright and the Deputy inspected the garage entry door and noted a large piece of the doorjamb on the floor from the deadbolt portion of the garage entry door, presumably from when Defendant kicked in the door to gain entry to the garage.[13]

In response to the trial court's direct question to Mr. Albright during the June 21st hearing, the witness approximated that the time interval between Defendant driving North down Mayer Rd. until a Deputy Sheriff arrived at his home was, "12 to 15 minutes."[14]

Michigan State Police Trooper Steven Kramer, assigned to the Richmond Post, was on duty on May 24, 2001, patrolling I-94 near the Wadhams exit in a fully marked cruiser.[15] At approximately 1:51 pm, Trooper Kramer received a "be-on-the-lookout" (BOL) radio transmission that described a white Dodge Shadow, along with a description of the driver, possibly involved in a "home invasion".[16] The BOL did not contain information that Defendant was traveling on I-94 (where Trooper Kramer first spotted the suspect vehicle). While Trooper

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[10] Id., at p. 2b, brackets supplied
[11] Id., at pp 3b - 5b
[12] Appellant's Appendix at pp. 56a, 58a
[13] Id., at p. 60a
[14] Appellee's Appendix at pp. 6b, 7b
[15] Appellant's Appendix at pp. 66a – 68a; Appellee's Appendix, at p. 10b
[16] Appellant's Appendix at pp. 69a, 70a

Kramer believed the BOL suspect could be "real close" to where he was patrolling I-94, this was merely a "possibility".[17]

Some three to five minutes after receiving the BOL transmission or, "a couple minutes before 2:00 o'clock", Trooper Kramer observed a vehicle matching the description, traveling East on I-94, more than 10-miles from the Albright residence. Trooper Kramer, traveling approximately 65-70 mph at the time, did not notice anything unusual about the speed of the suspect vehicle. Trooper Kramer reversed direction, cut through an expressway median, headed eastbound on I-94, and caught-up with the suspect vehicle in approximately two minutes.[18]

After verifying the driver's description from the BOL, Trooper Kramer dropped back, behind the suspect vehicle, obtained the plate number, and contacted his dispatch to verify that the vehicle he was following was the subject of the BOL. Traveling behind the suspect at approximately 70-mph, the trooper activated his overhead lights and the suspect vehicle began to slow down.[19] The suspect vehicle rode on the shoulder of I-94 from about one mile, between Smiths Creek to Ravenswood, at the approximate speed of 30 mph, precipitating Trooper Kramer to notify his dispatch that the vehicle was not stopping. Next, the vehicle suddenly, "darted back onto the roadway at a high rate of acceleration."[20]

Exiting the I-94 at the Dove/Range Rd. exit, the vehicle proceeded north on Range Rd., now joined by a Maryville Police Department unit. After a short distance on Range Rd., the suspect re-entered I-94 between 40-50 mph, this time going the wrong way, i.e. heading eastbound in the westbound lanes. Signs were visible indicating the vehicle was traveling in the

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[17] Id., at p. 95a; Appellee's Appendix at 41b
[18] Appellant's Appendix at pp 70a – 74a, 95a; Appellee's Appendix at pp. 9b, 10b
[19] Appellant's Appendix at pp. 72a - 74a
[20] Id., at pp. 76a, 77a

wrong direction.[21] The vehicle stuck to the shoulder and reached speeds between 60-70 mph, with both Trooper Kramer and the Marysville unit in close pursuit. Trooper Kramer testified that, other than going in the wrong direction, the suspect vehicle did not appear to be interfering with oncoming traffic. In fact, this traffic was moving out of the way.[22]

The vehicle proceeded in this fashion for approximately 1.5 miles to the I-69 interchange and then made its way toward the I-69 eastbound entrance ramp to westbound I-94. There was no oncoming traffic on the ramp.[23] Unlike the I-94 expressway at Range Rd., there were no markings on the ramp between I-94 and I-69 to notify vehicles heading in the wrong direction.[24] Defendant's vehicle traveled the wrong way down I-69 for about one mile before the collision that killed Nicholas and Gayle Ackerman. At the time of the nearly "head-on" collision, Defendant's vehicle was traveling approximately 65-70 mph, while the Ackerman's vehicle was traveling about 50-55 mph.[25]

Just prior to the collision, the suspect vehicle was staying as far as possible to the right of the ramp. The Ackerman's vehicle, however, pulled out to apparently attempt to pass a vehicle that was slowing down in front of it and, within seconds, was struck by the suspect vehicle.[26] Trooper Kramer testified that he viewed the collision as an accident because the vehicles appeared to be attempting to avoid each other.

Motorist Harry Krenke corroborated this testimony. A red vehicle, presumably the Ackermans' vehicle, had just passed Mr. Krenke's vehicle at a speed that was approximately 5

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[21] Id., at p. 79a
[22] Id., at pp. 78a – 82a
[23] Appellant's Appendix at p. 85a
[24] Appellee's Appendix, at p. 43b
[25] Appellant's Appendix at p. 89a
[26] Id., at p. 94a; Appellee's Appendix at pp. 45b - 47b

mph faster than Krenske was traveling. According to Krenke, other than the police cruiser, the white suspect vehicle, and the Ackermans' red vehicle, no other traffic was in the roadway.[27]

Officer Kramer proceeded to block-off the crashed vehicles from oncoming traffic. He first inspected the suspect Dodge White shadow, noting that the driver, identified in court as the Defendant, John Gillis, was unconscious and slumped over the steering wheel. Upon inspection of the occupants of the other vehicle, Trooper Kramer could tell that the Ackermans had been killed.[28] At trial, the People introduced Exhibits 19 and 20, which were photographs of the Ackermans, taken at the scene of the accident inside their crushed automobile, as they appeared to Trooper Kramer upon his immediate inspection.[29] These photographs were the subject of Defendant's motion in limine, which was denied by the trial court. When the prosecutor moved for the admission of these photographs, he did so acknowledging the on-going debate between the litigants as to their admissibility and moved for their admission, "subject to all the Court's prior rulings as to photos that were excluded and what have you."[30]

Michigan State Police Sergeant Robin Beach, an expert accident re-constructionist testified at trial that the suspect vehicle was traveling 66 mph and the red Dodge vehicle (the Ackermans' vehicle) was traveling 57 mph at the time their respective brakes were applied; their respective impact speeds were 57 mph for the suspect vehicle and 31 mph for the Ackermans' vehicle; both vehicles were decelerating upon impact, the Ackermans faster than the suspect vehicle; and both drivers appeared to have reacted within the standard reaction time.[31]

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[27] Appellee's Appendix at pp. 48b - 50b
[28] Appellant's Appendix at pp. 90a, 91a
[29] Appellee's Appendix at pp. 26b, 40b; Appellant's Appendix at p. 142a
[30] Appellee's Appexdix at p. 11b; Also see Appellant's Appendix at p. 142a, and 16a, where the Court of Appeals held that Defendant waived this issue on appeal as no objection was placed on the record at trial.
[31] Appellant's Appendix at pp. 116a – 128a

Doctor Kanu Virani, an expert in forensic pathology, testified about the May 25, 2001, autopsies he performed on the Ackermans. He testified in detail as to their cause of deaths. Mr. Ackerman suffered facial abrasions; two skull fractures, his skull was separated form the vertebral column; brain injury causing bleeding around the brain, separated neck at the occipital joint; bi-lateral rib fractures; lacerations to his aorta causing chest cavity bleeding; bruises to his lungs; laceration of the spleen causing bleeding in the abdominal cavity; fractured right femur; and fractured left ankle.[32] Dr. Virani concluded that Mr. Ackerman died instantly of his head and chest injuries, consistent with a head-on automobile collision.[33]

Dr. Virani similarly testified that Mrs. Ackerman suffered: bruising to the right side of her forehead; open head wound separating her skin from her skull; fractures of her nasal bone, bilateral maxilla and mandible fractures; complete separation fracture of the joint between the first cervical vertebra and the base of her skull; chest bruising; rib fractures; severed back at the lower thoracic area; abdominal abrasions; lacerations to the heart, aorta, liver and spleen causing bleeding in both the chest and abdominal cavities; large wound to the right leg; fractures to the left arm, right femur, right elbow, and both ankles, lacerations to both ankles, and back of the right elbow; and bruising on the right hand.[34] Her cause of death was blunt force trauma consistent with a head-on collision. Like her husband, she died instantly. Dr. Virani further concluded that due to the above-described massive injuries, they were involved in a severe accident.[35]

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[32] Appellee's Appendix at pp. 32b, 33b
[33] Id., at p. 34b; Appellant's Appendix at p. 64a
[34] Appellee's Appendix at pp. 36b, 37b; Appellant's Appendix at p. 478
[35] Appellee's Appendix at pp. 38b, 39b

As for Defendant's injuries, the parties stipulated that Defendant suffered a closed-head injury in the accident and that the state's forensic psychologist as well as a private psychologist opined that Defendant had amnesia of the events of May 21, 2001.[36]

One of the last witnesses presented to the jury in the People's case in chief was Macomb County Sheriff Deputy Dan DeGraw, who testified that on April 12, 2000, he was on duty and received a BOL regarding a breaking and entering where the suspect had been discovered and fled.[37] Deputy spotted a black Chevy Blazer matching the description and attempted to effect a traffic stop. The suspect vehicle attempted to maneuver around the Deputy's patrol unit but came to a momentary stop. When the officer advised the suspect to turn off his vehicle and throw the keys out the window, the suspect fled.[38] A two-mile high-speed chase ensued that ended when the suspect vehicle crashed. The Macomb County Deputy identified the suspect as the instant Defendant, John Gillis.[39]

Procedural Summary.

Defendant's trial counsel waived Defendant's preliminary exam. Instead, Defendant filed a motion in the circuit court to quash the information on the two-count felony murder charge (the only criminal charges brought in this case).

First, however, Defendant moved to dismiss the case based on Defendant's incompetence to stand trial. Following a hearing conducted on or about April 29, 2002, Defendant's motion was denied.[40]

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[36] Id., at p. 57b, 58b
[37] Appellant's Appendix at pp. 130a, 131a
[38] Id., at pp. 133a – 135a
[39] Id., at p. 140a
[40] Id., at p. 2a

The trial court conducted an evidentiary hearing on Defendant's motion to quash on June 21, 2002. Two witnesses testified: homeowner Steven Albright and Michigan State Trooper Steven Kramer. Their testimony is summarized above. The lower court denied Defendant's motion to quash the felony murder information.[41]

Also prior to trial, the People gave notice of their intent to introduce evidence of prior bad acts pursuant to MRE 404 (b). Defendant essentially responded with a motion in limine as to both the prior bad acts and photographs (People's Exhibits 19 and 20) depicting the Ackermans in their automobile immediately after the crash.[42] As to the prior act, the People made an offer of proof of a prior conviction for fleeing and eluding and 2nd degree home invasion stemming from an April 2000 incident, which they intended to introduce in their case in chief.[43]

Defendant's trial counsel argued that since his client had no memory of the incident, he could not testify, obviating the necessity for any prior bad acts evidence in rebuttal. Counsel also argued that the *VanderVliet*[44] factors, considered in the requisite prejudicial balancing test, weighed in Defendant's favor and asserted that the only purpose for introducing this past similar criminal act in the People's case in chief was to show that Mr. Gillis acted in conformity with a criminal character, which Defendant's counsel further asserted was impermissible under 404 (b). Defendant's counsel also argued that any curative instruction under these circumstances would be futile.[45]

The Prosecutor argued that the evidence was being introduced, regardless of Defendant's testimony, for the usual list of permissible purposes: i.e. to demonstrate, "a pattern of behavior,

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[41] Id., at p. 3a
[42] Appellee's Appendix at pp. 11b, 12b;
[43] Id., at pp. 13b - 15b, 52b
[44] 444 Mich 52 (1993)
[45] Appellee's Appendix at pp. 14b, 15b, 22b – 24b

motive, scheme, plan and system in doing an act as well as lack of mistake."[46] The Prosecutor also asserted that the striking similarity between the instant crime and the prior Macomb County crime would be used to prove Defendant's intent, i.e., whether Defendant's intent in breaking into Albright's home was to commit a larceny or some other felony.[47]

The trial court denied Defendant's motion in limine, the effect of which was to allow the Prosecutor to introduce the prior fleeing and eluding and home invasion conviction in their case in chief.[48]

The Prosecutor elected to charge Defendant with first-degree felony murder and thus requested the jury be charged under the standard felony murder instructions as well as a special instruction for "escape". Defendant requested standard instructions for first-degree fleeing and eluding (causing death) and manslaughter (both voluntary and involuntary). Defendant's requested jury instructions were denied and the Prosecution's requested jury instructions were granted. The trial court, although not specifically requested by the Prosecutor, instructed the jury on felony murder and second degree murder as the only lesser included offense, giving the special instruction on escape.[49]

The proofs presented at trial are summarized above. At the close of the People's presentation of proofs, Defendant moved, unsuccessfully, for a directed verdict and elected not to present proofs of his own. The jury deliberated for approximately two hours before returning a guilty verdict on both counts of first-degree felony murder.

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[46] Id., at p. 13b
[47] Id., at pp. 16b, 17b – 20b
[48] Id., at p. 25b
[49] Appellant's Appendix at pp. 150a, 151a

LEGAL ARGUMENT

I. THE PLAIN LANGUAGE OF THE FELONY MURDER STATUTE PRECLUDES A CONVICTION FOR FIRST DEGREE MURDER WHEN THE HOMICIDES OCCURRED AFTER COMPLETION OF THE PERPETRATION, OR ATTEMPT TO PERPETRATE, FIRST OR SECOND DEGREE HOME INVASION, AND WHEN THE HOMICIDES OCCURRED AT A SIGNIFICANT REMOVE IN SPACE AND TIME FROM THE LOCUS OF SAID HOME INVASION AND WHEN THE HOMICIDES OCCURRED DURING THE PERPETRATION OF A SUBSEQUENT INTERVENING FLEEING AND ELUDING FELONY

Summary of Argument.

Defendant was charged with first-degree felony murder, the highest crime from among the various felonies for which he could have been charged due to his actions of May 24, 2001. Defendant's appellate counsel concedes that this charging decision was within the scope of prosecutorial discretion. The predicate felony of home invasion, however, was completed at the point in time when he retreated from Mr. Albright's residence. When confronted by the homeowner, Defendant fled the premises, pursued by the owner. This pursuit ended as Defendant drove away north down Mayer Rd. and Mr. Albright returned to his home to call 911. By the time he reached I-94 some five to ten minutes later, Defendant had reached a place of at least temporary safety and was "driving normally".[50] Pursuant to the law set forth and analyzed below, the window of felony murder under these facts and circumstances had closed.

By the time the Michigan State Trooper spotted Defendant, his escape from the Albright residence also had been completed and his continued progress on I-94 during the brief period it took for the Trooper to catch-up with him was not part of a "continuous transaction" with the completed home invasion, nor was this progress "immediately connected" with the completed home invasion. When Defendant decided to flee the State Trooper, he committed a second and

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[50] Appellant's Appendix at p. 11a, as summarized by the *Gillis* panel of the Michigan Court of Appeals.

distinct felony of fleeing and eluding; a crime the St. Clair County Prosecutor, in its proper discretion, elected not to charge in this case. When Defendant sped the wrong way down two expressways to elude the police, ultimately killing the Ackermans, this became first degree fleeing and eluding. The resulting homicide under such circumstances does not constitute felony-murder.

Standard of Review.

Defendant agrees that questions of statutory interpretation are reviewed *de novo* and that a reviewing court interpreting a statute must give effect to the legislative intent of the statute.[51]

Statutory Felony-Murder.

The question posed by this Court is whether the plain language of MCL 750.316 permits a conviction for first-degree murder "in the perpetration of" a first or second-degree home invasion where the homicide occurs several miles away from the dwelling and several minutes after the defendant has left the dwelling.

The pertinent portion of the felony-murder statute provides, "[a] person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life: (b) [m]urder committed in the perpetration of, or attempt to perpetrate, ...home invasion in the first or second degree."[52]

On appeal before this Court, the St. Clair County Prosecutor conducts a broad historic common law analysis, taken from our entire national jurisprudence, to support an expansive view of the concept of murder committed "in the perpetration of" a home invasion. Almost since its inception, however, the felony-murder rule has suffered very bad press and stringent criticism

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[51] *People* v *Law*, 459 Mich 419, 423 (1999) and *People* v *Gould*, 237 Mich 156 (1926).
[52]MCL 750.316

resulting in a quite narrow application.[53] In *People* v *Aaron,* this Court took note that felony murder, "has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule."[54] The *Aaron* Court stated the following in abolishing common law felony-murder in Michigan:

> Whatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Indeed, most states, including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it. The felony-murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based.
>
> We conclude that Michigan has no statutory felony-murder rule which allows the mental element of murder to be satisfied by proof of the intention to commit the underlying felony. Today we exercise our role in the development of the common law by abrogating the common-law felony-murder rule. We hold that in order to convict a defendant of murder, as that term is defined in Michigan case law, it must be shown that he acted with intent to kill or inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to casue death or great bodily harm. We further hold that the issue of malice must always be submitted to the jury.
>
> The first-degree murder statute will continue to operate in that all murder committed in the perpetration or attempted perpetration of the enumerated felonies will be elevated to first-degree murder.[55]

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[53] Comment, *Limitations on the applicability of the felony-murder rule in California*, 22 Hastings L J 1327; Comment, *The felony-murder doctrine repudiated*, 36 Kentucky L J 106; Comment, *The felony murder rule in Ohio*, 17 Ohio State L J 130 (1956); Comment, *Felony murder as a first degree offense: An anachronism retained*, 66 Yale L J 427 (1957); Crum, *Causal Relations and the felony-murder rule*, 1952 Washington U L Q 190.

[54] 409 Mich 672 (1980)

[55] Id., at pp. 733-44

This Court similarly has taken a dim view of other attempts, judicial and prosecutorial, that goes beyond the plain language of a statute via an expansive interpretation of a phrase or doctrine, so that an otherwise missing element of a charged crime is supplied.

This Court's holding in *People* v *Randolph* [56] is instructive in this regard, and applicable by analogy, to the question certified by the court. In that case, Defendant was jury convicted under the unarmed robbery statute. Randolph removed items from a Meijer store, then subsequently exerted force when confronted by store security in the parking lot. He did not use force while in the store, and lawfully purchased some of the in his possession.[57]

On appeal, the prosecution adopted a "transactional approach" to expand the timeframe for completion of the charged crime such that the unarmed robbery statute, MCL 750.530, requiring the taking of property by force, violence, or assault, was held to be satisfied even though the "force" required by the plain language of the statute was not exerted inside the store where the taking took place, and was not exerted until the Defendant was outside the store, in the parking lot, and was exerted to retain possession of the goods rather than to effectuate the actual taking. The Court of Appeals [58] reversed Defendant's conviction on unarmed robbery, remanding for entry of a conviction of larceny in a building with additional instruction to the prosecutor that Defendant could be retried on unarmed robbery if additional evidence was presented.

The *Randolph* Court held that the plain language of the unarmed robbery statute required contemporaneous force and further held that force used later (i.e. outside the store for the purpose of retaining the already removed goods, or even force used to effectuate an escape) was

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[56] 466 Mich 532 (2002)
[57] Id., at pp. 534-35
[58] 242 Mich App 417 (2000)

beyond the scope of the statutory language.[59] Thus, the prosecutor could not elevate a simple larceny into robbery by use of the fictitious concept of the "transactional approach" to supply the missing element of the charged crime.

The *Randolph* Court's rationale relative to "completion" of the charged crime is also useful in addressing the certified question in this case. In expressly overruling the "transactional approach" to viewing the timeline of a robbery, this Court criticized a line of Court of Appeals decisions, beginning with *People* v *Sanders* in 1970 [60], that used the "transactional approach" fiction to express that a robbery is not completed until the defendant reaches a place of temporary safety and thus completes his escape. This Court concluded, "[t]his 'transactional approach' can not be harmonized either with the language of MCL 750.530 or with the common law history of our unarmed robbery statute." [61]

The law of home invasion (addressed with respect to the Prosecutor's arguments on this issue in the next section of this brief) is that the crime is completed once the defendant has entered the building. See, for example, *People* v *Hegwood* [62] and *People* v *Fisher*.[63] Home invasion is markedly distinct from burglary or robbery, the predicate felonies in <u>*all*</u> the cases relied upon by the Prosecutor. Thus, in each of the dozens of cases from other jurisdictions cited by in the People's brief on appeal, there was some direct and continuing transaction that was immediately connected with the robbery or burglary being analyzed therein.

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[59] *Randolph, supra*, at p. 536
[60] 28 Mich App 274 (1970)
[61] *Randolph, supra*, at p. 541
[62] unpublished per curiam opinion of the Court of Appeals, decided June 24, 2003 (Docket No. 239352)
[63] unpublished per curiam opinion of the Court of Appeals, decided March 23, 1999 (Docket No. 202821)

The Plain Meaning of Murder Committed "*in the perpetration of*" a Felony.

The res gestae analysis necessary to address the first issue certified by this Court is better informed by starting with the American Jurisprudence treatment of felony-murder that is directly concisely on point, and essentially replaces the extensive common law survey propounded by the Prosecutor in response to the question:

> § 67. RES GESTAE OF UNDERLYING CRIME
>
> It is the general view that a homicide is committed in the perpetration or attempt to perpetrate another crime when the accused is engaged in any act required for the full execution of the initial crime, and the homicide is so closely connected with such other crime as to be within the res gestae thereof. A homicide is committed in the perpetration or attempted perpetration of a crime specified by the felony-murder statutes when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction. Time, distance and the causal relationship between the underlying felony and the killing are factors to be considered in determining whether the killing is part of the felony and therefore subject to the felony murder rule. The killing should be in close proximity in terms of time and distance with the felony. *However, mere coincidence of homicide and felony is not sufficient*. The homicide must be committed in the perpetration of or an attempt to perpetrate a felony. The death must be caused by an act in course of or in furtherance of the felony. It does not matter if the death occurs much later, so long as the fatal blow was struck during the course of the felony. [footnotes omitted, emphasis supplied][64]

Defendant asserts that the critical factors of time and place, as applied to the instant matter, where the home invasion victim, Mr. Albright, had been returned to a place of safety, that Defendant himself had reached a place of temporary safety, and that it was largely coincidental that the State Trooper spotted Defendant thereafter, militates against application of the felony-murder rule in this case.

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[64] 40 Am Jur 2d Homicide §67

The Prosecutor sets forth an exhaustive analysis of the common law of several jurisdictions to support their contention that murder committed "in the perpetration of, or attempted perpetration of" a home invasion includes within its scope the facts and circumstances of this case where the Defendant was removed in space and time from the home invasion and had also completed an escape. The Prosecutor's analysis is comprehensive to the point that it implies that the collective holdings in the highly varied burglary and robbery scenarios constitute a majority rule for purposes of resolving the issue posed by this Court in this case. Numerous cases reach different conclusions, however, and must be considered within the home invasion context of this case.

People v *Marwig* [65] and *People* v *Moran* [66], for example, establish what has been referred to as the "New York rule", which establishes the principle that where a defendant has left the premises where a robbery occurred, a homicide committed in the course of the defendant's flight did not constitute murder in the first degree unless premeditated. Further, these courts held that if the killing is done in the course of flight rather than on the premises of the robbery, the murder was not performed during the perpetration of the robbery.

In *United States* v *Naples*, [67] the New York rule was recognized as limiting felony-murder committed in the perpetration of a burglary to a killing that takes place while a burglar remains on the premises. The federal court in *Naples* also noted that in New York, it had been held that while the breaking and entering is completed before he leaves the home, the defendant nevertheless continues to be engaged in the commission of the crime until he leaves the home with his plunder. If, the defendant kills anyone resisting him while on the premises, engaged in

[65] 227 NY 382; 125 NE 535 (1919)
[66] 246 NY 100; 158 NE 35 (1927)
[67] 192 F Supp 23 (1961, DC Dist Col), revd on other grounds 113 App DC 281, 307 F2d 618

securing his plunder, or in any of the acts immediately connected with the crime, he is guilty of felony-murder.

Courts also have recognized that whether a murder has occurred in the perpetration of a felony in the "escape" context, depends on whether there is a break in the chain of events of the predicate crime. One example of a break in the commission of the predicate felony, applicable to this case, is where the victim of the predicate felony is restored to a place of safety.[68] A reasonable jury could only conclude under the facts of this case that Mr. Albright had achieved complete safety from the invasion of his home. Albright was armed and had returned to the safety of his home after Defendant had completely vacated the premises; he had completed an unsuccessful search for the Defendant in his surrounding neighborhood; he had twice contacted local law enforcement and provided a very specific description of Defendant and his vehicle; and was in fact following the progress of the BOL along with a deputy sheriff, as it played out over the police radio, some minutes after the home invasion had been completed. Thus, the Michigan Court of Appeals properly held that, "defendant had already escaped from the scene of the home invasion" and "was fleeing from the police when he collided with the Ackermans' vehicle..." [69]

Another significant factor in the analysis of the first issue posed by this Court is whether the nexus between the murder and the predicate felony is a mere coincidence and thus, too attenuated to support felony-murder. In *Campbell* v *State* [70], for example, defendant's felony-murder conviction was reversed on the basis that the mere coincidence of homicide and felony was insufficient where the defendant was the surviving felon in an armed robbery during which the police killed his co-felon accomplice. Similarly, courts in various jurisdictions, including

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[68] *People* v *Mills*, 252 Ill App 3d 792, 800 (1993) and *Commonwealth* v *Kelly*, 333 Pa 280; 4 A 2d 805 (1939), citing *People* v *Moran, supra.*
[69] Appellant's Appendix at p. 13a.
[70] 293 Md 438, 446; 444 A 2d 1034 (1982)

Michigan, have held that under the felony-murder doctrine, a surviving felon is not guilty of felony-murder when a victim kills a co-felon during the commission of the crime.[71] Likewise, on the basis of coincidence, felony-murder is not committed when the victim of a predicate felony accidentally kills a bystander to the crime.[72]

The question posed here, which is apparently one of first impression, is whether an intervening felony (fleeing and eluding), one that is not on the roster of predicate felonies under Michigan's felony-murder statute, and which follows the completion of such a predicate felony (home invasion), constitutes a sufficient break in the chain of events such that the resulting homicide lies outside the scope of the legislative intent of the felony-murder statute. Defendant asserts that the tragic homicide in this case is indeed outside the scope of the plain language of the felony-murder statute.

In matters of statutory interpretation, this Court recently held that, "[w]hen construing a statute, our primary goal is 'to ascertain and give effect to the intent of the Legislature'. To do so, we begin by examining the language of the statute."[73] If statutory language is certain and unambiguous, then the language is given its ordinary and generally accepted meaning by this Court, [74] and this Court cannot read into the words of the statute but rather, must enforce the statute, as written.[75] If the legislature intended to include homicide committed in the perpetration of the felony of fleeing and eluding, then fleeing and eluding would have been included in the list of enumerated predicate felonies. As this specific felony is not contained in the list of

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[71] *People* v *Austin*, 370 Mich 12, 32-33 (1963); *People* v *Washington*, 44 Cal Rptr 442, 445, 402 P.2d 133 (1965); *Sheriff, Clark County* v *Hicks*, 89 Nev 78, 506 P 2d 766, 768 (1973); *State* v *Canola*, 73 NJ 206, 226, 374 A 2d at 30 (1976).
[72] *State* v *Oxendine*, 187 NC 658, 661-62, 122 SE 568, 570 (1924); and *Commonwealth* v *Moore*, 121 Ky 97, 98-100, 88 SW 1085, 1086 (1905).
[73] *People* v *Phillips*, 469 Mich 390, 395 (2003)
[74] *People* v *Moore*, 470 Mich 56, 61 (2004), interpreting the felony-firearm statute.
[75] *People* v *Akins*, 259 Mich App 545, 551 (2003), interpreting the felony-murder statute.

predicate felonies, then it must be presumed by this Court that the legislature did not intend for fleeing and eluding to fall within the scope of the felony-murder statute.

To adopt the Prosecution's interpretation would amount to impermissibly expanding the scope of the felony-murder statute beyond its plain meaning in contravention of *Randolph, supra*. The Prosecution's view requires that the statutory phrase "in the perpetration of, or attempted perpetration of", be extended in this case to apply to circumstances that include:

- A home invasion characterized by an immediate retreat by Defendant upon confrontation by the homeowner, without the commission of a separate larceny, robbery, assault, or other separate crime within the commission of said home invasaion;
- Defendant reaching a place of temporary safety along I-94, some ten miles from where the home invasion occurred, and where he was not observed nor pursued by the home invasion victim, police, or any other third party;
- The restoration to complete safety of the home invasion victim;
- The completion of an unsuccessful search for the Defendant by the home invasion victim;
- The coincidental subsequent discovery of Defendant as a possible suspect by police, pursuant to a BOL bulletin, which discovery occurred nearly ten miles and as many as 15-minutes after the completion of the home invasion; and
- The commission of a separate intervening felony (fleeing and eluding) that is not enumerated as a predicate felony in the felony-murder statute.

Such expansion of the meaning of the statutory phrase "in the perpetration of", would have the effect of impermissibly converting criminal acts that are distinct and outside the scope of the plain language of the felony-murder statue, into that statute's grip. The obvious advantage for the prosecution is the implication of a life sentence without possibility of parole. This harsh result, however, was never intended by the legislature. Thus, based on the authority set forth above and for the reasons herein stated, the decision of the Court of Appeals in *People* v *Gillis* [76] must be affirmed by this Court.

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[76] Unpublished per curiam opinion of the Court of Appeals, decided August 17, 2004 (Docket No. 245012).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S MOTION TO QUASH THE FELONY-MURDER INFORMATION WHEN THE HOMICIDES OCCURED AFTER COMPLETION OF THE PERPETRATION, OR ATTEMPT TO PERPETRATE, FIRST OR SECOND DEGREE HOME INVASION, AND WHEN THE HOMICIDES OCCURRED AT A SIGNIFICANT REMOVE IN SPACE AND TIME FROM THE LOCUS OF SAID HOME INVASION AND WHEN THE HOMICIDES OCCURRED DURING THE PERPETRATION OF A SUBSEQUENT INTERVENING FLEEING AND ELUDING FELONY

Standard of Review.

Defendant agrees that a blended standard of review is utilized in an appeal of a trial court's denial of a motion to quash the information. As stated by the Court of Appeals in this case, a trial court's decision regarding a motion to quash a felony information is generally reviewed *de novo* to determine if the district court abused its discretion in binding the defendant over for trial.[77]

There was no continuous transaction leading to homicides that were immediately connected to the home invasion felony in this case.

The lower court, after taking the testimony of homeowner Steven Albright and State Trooper Steven Kramer at a June 21, 2002, evidentiary hearing, made the following ruling on Defendant's motion to quash the felony information:

> The Court in deciding this issue has concentrated on the perpetration or the attempt to perpetrate breaking and entering of a – the Court has had the benefit of the, of the briefs, argument of Counsel, and in particular the Court has reviewed the cases of *Oliver*, *Gomitty* and *Goree*. The Court has learned from those cases, in particular what the Court considers to be the law that controls the decision in this case in which the Defendant seeks the quashing of the Information, and to allow the jury to be charged on lesser included offenses of manslaughter or negligent homicide. The law in Michigan is that the perpetration can be found if the action can be considered to be a continuous action. That is, not interrupted by temporary,

[77] *People* v *Northey*, 231 Mich App 568, 574 (1998).

by temporary safety.

> The Court believes after listening to testimony, which the Court considers to be credible to believe, that this was a continuous uninterrupted by temporary safety action that was taken by this Defendant. And, therefore, the Motion to Quash is denied.[78]

In overruling the trial court on this issue, the Court of Appeals cited to *People* v *Goddard* [79] and *People* v *Thew* [80] in holding that a causal connection between the murder and underlying felony is required for felony-murder and, in the escape context, the causal connection is heightened to require that the murder be a *continuous* transaction with, or that the murder be *immediately* connected with, the predicate felony.

On this basis, the Court of Appeals properly concluded that the circumstances of this case did not constitute a continuous transaction but rather, one that was indeed interrupted by several intervening events such as the home invasion victim's restoration to safety after his completion of an unsuccessful search, the temporary safety achieved by Defendant along I-94, unobserved by law enforcement or any one else, and the intervening commission of a separate and distinct subsequent felony (fleeing and eluding) several minutes after the initial felony. Thus, contrary to the temporal requirement articulated in both *Goddard* and *Thew*, the Ackerman homicides were not immediately connected with the subject home invasion.

In addition, the case law expressly relied on by the trial court is factually and analytically distinguishable from the facts presented in the matter at bar. In *People* v *Gimotty*, [81] for example, defendant challenged his bind over on felony-murder on the basis he had reached "temporary safety" in his escape from the clothing store where he stole six dresses. In that case,

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[78] Appellant's Appendix at pp. 35a, 36a
[79] 135 Mich App 128, 135 (1984) rev'd in part on other grounds, 429 Mich 505 (1988).
[80] 201 Mich App 78, 85-86 (1993)
[81] 216 Mich App 254 (1996)

however, the defendant sped out of the store's parking area, observed the entire time by an onlooker who not only contacted police, but also followed defendant the police began their pursuit. It was during the subsequent high-speed police chase that defendant struck and killed a three year-old child. Thus, Gimotty's claim that he had reached a place of temporary safety was a fiction. In the instant case, the facts surrounding Defendant's escape were uncontested and, as set forth above, the trial court found the testimony depicting this escape credible. These facts indicated that Defendant, however briefly, had achieved temporary safety. Unlike *Gimotty*, no one had followed John Gillis down Mayer Rd. and onto I-94. Also, no one in the world knew where he was until an observant State Trooper responded to a BOL. This coincidence is distinct from the events in *Gimotty*.

Gimotty is also analytically distinct from the instant case to the extent it involved robbery rather than home invasion. The robbery case law holds that, "escape is part of the original felony ... because getting away with the contraband is as essential to the execution of an armed robbery as the theft itself."[82] Thus, there can be no completed escape in a robbery unless the thief reaches a place of complete custody with his contraband.[83] Home invasion, however is completed at the point of entry (or at least the point of exit) from the invaded dwelling.[84] The statute provides for multiple punishments for other crimes committed while the home invasion continues; crimes like the assault or murder of the home-owner, robbery, or burglary.[85]

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[82] *People* v *Goree*, 30 Mich App 490, 495 (1971)
[83] Id., citing *People* v *Smith*, 232 NY 239, 133 NE 574 (1921).
[84] Compare *People* v *Hegwood*, *supra*, and *People* v *Fisher*, *supra*, (holding that a home invasion is completed upon entry of the dwelling) with *People* v *Zavorski*, unpublished per curiam opinion of the Court of Appeals, decided October 1, 2002 (Docket No. 227973) (holding that a home invasion is not completed until defendant exits the dwelling).
[85] MCL 750.110a (6)

Finally, the trial court's reliance on *People* v *Oliver* [86] is similarly misplaced, distinguishable, and constituted an appropriate ground for reversal on Defendant's motion to quash by the Court of Appeals. In *Oliver*, the defendant shot a trooper a few miles from the scene of, and 30-minutes after, an armed robbery. The *Oliver* panel, like the *Goree* and *Gimotty* panels, focused on the incomplete nature of an armed robber that flees with the stolen goods attempting to escape, and prior to his ability to secure the stolen property, is discovered and commits murder. The *Oliver* panel cited *People* v *Podolski*, [87] a case relied on by the Prosecution to support its claim that the instant homicides were in the perpetration of the home invasion.

Podolski, like the other robbery and burglary cases relied on by the Prosecutor to support its expansive view of felony-murder in the home invasion context, is both factually and analytically distinguishable from the case at bar on the basis of the elements that make up the commission of the distinct crimes of robbery and burglary. First, *Podolski* is a case that involves a bank robbery in progress in prohibition era Detroit. Police officers interrupted the robbery while it was in progress and, in the ensuing gun battle that occurred in "the immediate vicinity of the bank", one officer accidentally felled a fellow officer.[88] Just as in the Court of Appeals cases relied on by the trial court and prosecutor in denying Defendant's motion to quash the information, the facts and crime of the instant matter just do not line up. The instant case simply does not involve a gun battle between robbers and police on the very premises where the predicate felony took place; a gun battle that broke out as the robbery was occurring. Instead, this case involves a subsequent intervening felony that occurred minutes after completion of the

[86] 63 Mich App 509 (1975)
[87] 332 Mich 508, 518 (1952)
[88] Id., at p. 514

predicate felony, and after the completion of an effective escape, where Defendant was literally cruising along I-94 in a state of temporary, albeit brief, safety.

Second, from an analytical perspective, the *Podolski* Court, in addressing the question of homicide in connection with armed robbery and/or burglary, places emphasis on the element of the removing and concealment of the stolen property, which acts serve to lengthen the time the defendants remain "in the perpetration of" their respective crimes. As to burglary, the *Podolski* Court held that, "[a] burglar may be said to be engaged in the commission of the crime of burglary while making away with the plunder, and while engaged in securing it."[89] Likewise, "a robber may be said to be engaged in the commission of the crime while he is endeavoring to escape and make away with the goods taken." [90] In the instant case, the predicate felony of home invasion is not similarly extended. While a home invading defendant may be separately charged with other crimes committed during the commission of the home invasion, at the point the invader leaves the dwelling, the crime of home invasion has been completed.[91]

The Prosecutor asserts that the evolution of the home invasion felony, first as a replacement to the crime of breaking and entering in October 1994, and then with the amended language in the 1999 amendment,[92] which created degrees of home invasion, and extended the circumstances supporting a charge to include any point in time in which a defendant is "entering, present in, or exiting the dwelling".[93] The Prosecutor also seems to emphasize that the 1999 amendment removed the "intent" to commit larceny or assault from the elements necessary for home invasion. Without any analytical development whatsoever, the Prosecutor suggests that

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[89] Id., at p. 518, emphasis supplied.
[90] Id., emphasis supplied.
[91] MCL 750.110a, *Hedgwood, supra, Fisher, supra*, and *Zavorski, supra*.
[92] PA 1999, No. 44
[93] MCL 750.110a (2) and (3)

this minor expansion of the timeframe for the continuation of the home invasion felony, somehow supports his expansive view of the scope of the felony-murder rule. While this amendment may explain the different results reached by the *Hegwood* and *Fisher* panels, *supra*, on the one hand, and the *Zavorski* panel, *supra*, on the other hand, relative to the exact point of completion of a home invasion, the amendment has no effect on the resolution of the first issue posed by this Court.

Pursuant to *Zavorski* and pursuant to the terms of the plain language of the home invasion statute, as amended, any home invasion is completed once the defendant exits the dwelling. If a defendant does more than simply break the hold of the dwelling, however, and removes property from the dwelling in the course of the home invasion and further attempts to escape with the stolen property, then the crime of robbery or larceny will extend the perpetration of the felony to a point in time where the defendant finally secures the property, as held by *Podolski, supra,* and its progeny. This feature, as well as a variety of immediate escape/chase scenarios, are prevalent in nearly every case relied on by the Prosecution. The case at bar is different. The homicides that occurred herein simply did not occur during the perpetration of the home invasion. Had Mr. Albright been killed by Defendants actions in his home, or a police officer been killed by Defendant's vehicle while Gillis attempted to flee Albright's driveway, or even if a bystander was moved down by Gillis' vehicle as he speed off down Mayer Rd. or even some adjoining street pursued by the homeowner or by law enforcement, then the felony-murder statute would apply.

As a matter of law, when a defendant is charged with felony-murder when the homicide occurs following the completion of the home invasion during which no property is taken and no assault occurs, follows the completion of defendant's escape from the dwelling, without pursuit

by either the homeowner or by law enforcement, where defendant reaches a place of temporary safety defined as a place where the home invasion victim can no longer observe him and where his whereabouts are unknown to law enforcement, when the home invasion victim has also been restored to safety, and perhaps most significantly, where defendant elects to commence a separate and distinct subsequent but non-predicate felony that has a direct causal relationship to the homicide, a trial court must quash the information on such a felony-murder. Thus, based on the authority set forth above and for the reasons herein stated, the decision of the Court of Appeals in *People* v *Gillis* [94] in reversing the trial court's denial of Defendant's motion to quash the felony-murder information must be affirmed by this Court.

[94] Unpublished per curiam opinion of the Court of Appeals, decided August 17, 2004 (Docket No. 245012).

III. THE TRIAL COURT REVERSIBLY ERRED BY DETERMING THAT A JURY INSTRUCTION ON THE INFERIOR-OFFENSE OF INVOLUNTARY MANSLAUGHTER WAS NOT SUPPORTED BY A RATIONAL VIEW OF THE EVIDENCE AND BY GIVING A SPECIAL INSTRUCTION ON ESCAPE THAT WAS MISLEADING

Standard of Review.

The Prosecutor misstates the standard of review as one of an abuse of discretion in its brief. Rather, it is well settled that claims of instructional error are reviewed de novo, to determine whether the instructions given to the jury, considered in their entirety, were sufficient to protect a defendant's rights, and if they were not, whether reversible error occurred.[95]

A defendant is entitled to a properly instructed jury pursuant to both the United States Constitution and the Constitution of the State of Michigan.[96] The trial court is trusted with the duty to accurately charge the jury as to the elements of an offense, and what must be provided in order to establish such elements. Perfect instruction is not the standard but rather, reversal is not required when the instructions given fairly presented the issues to be tried and sufficiently protected the defendant's rights.[97] On the other hand, a conviction may be reversed because of an erroneous and misleading instruction.[98]

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[95] *People* v *Cornell*, 466 Mich 365 (2002); *People* v *Heikkinen*, 250 Mich App 322, 327 (2002); *People* v *Kurr*, 253 Mich App 317, 327 (2002); and *People* v *Moldenhauer*, 210 Mich App 158 (1995).
[96] US Const Am VI; Mich Const, 1963, Art 1, §20; *People* v *Liggett*, 378 Mich 706, 714 (1964).
[97] *People* v *Aldrich*, 246 Mich App 101 (2001)
[98] *People* v *Vaughn*, 447 Mich 217, 228 (1994); *Liggett*, *supra* at p. 715.

Manslaughter is an Inferior Offense to Murder requiring a Jury Instruction Because a Rationale View of the Evidence Presented in this Case Supports such an Instruction.

Manslaughter recently has been affirmed to be a lesser included offense to murder and the manslaughter instruction must be given when supported by a rational view of the evidence.[99] As noted by the *Gillis panel*, citing the *Holtschlag* Court, the sole element distinguishing manslaughter from murder is malice. "[I]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.'"[100] When a homicide is not committed with malice but is performed, "with a lesser *mens rea* of gross negligence or an intent to injure", then the killing is involuntary manslaughter.[101]

Defendant was charged with first and second-degree murder. At trial, Defendant objected to the second-degree murder charge and requested that the jury be charged with fleeing and eluding and voluntary and involuntary manslaughter. The requested jury instructions were denied and this was held to be reversible error upon intermediate appellate review. Despite the clear direction and mandate of the above authority, the Prosecutor nevertheless, and apparently in all seriousness, asserts that the facts of this case do not rationally support a manslaughter charge.

All that is necessary for the requisite manslaughter instruction is a factual scenario that supports the proposition that Defendant did not intend to kill the Ackermans. The Prosecutor attempts to analogize the specific facts of *Mendoza* (i.e. a drug deal gone bad, resulting in an armed struggle) with the facts of the fleeing and eluding felony committed by Defendant in this

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[99] *People* v *Mendoza*, 468 Mich 527, 541 (2004) and *People* v *Holtschlag*, 471 Mich 1 (2004)
[100] Id., at 21, quoting *People* v *Datema*, 448 Mich 585, 594-95 (1995)
[101] Id. Also see *Gillis*, *supra*, slip opinion at p. 5.

case, for the proposition that no reasonable person could find Defendant's actions other than acts deliberately calculated to cause death or great bodily harm.

The Court of Appeals disagreed, concluding that reasonable jurors could find that Defendant was grossly negligent in fleeing from the police in such a manner. Sufficient evidence was adduced at trial could support a finding that the Ackerman homicides were unintended, without malice and not caused by any action of Defendant naturally tending to cause death. Trooper Kramer testified, for example, that other than going in the wrong direction, the suspect vehicle did not appear to be interfering with oncoming traffic. In fact, traffic was moving out of Defendant's way.[102] Also, the only non-law enforcement res gestae witness testified that it appeared the Ackermans' vehicle and Defendant's vehicle attempted to avoid one another just prior to the collision.[103]

The Special Jury Instruction on Escape Misled the Jury.

The trial court charged the jury with the following special instruction over Defendant's objection:

> Actions immediately connected with the felony of home invasion in the first degree, including attempts to escape or prevent detection are a continuous part of the commission or perpetration of the felony of home invasion in the first degree.
>
> Escape ceases to be a continuous part of the felony of home invasion in the first degree if and when the Defendant reaches a point of at least temporary safety.[104]

This instruction misstates the law as set forth in this brief in Argument sections I & II, relative to the causal connection and nexus between the Ackerman homicides and the home invasion felony. The issue to be decided by the trier of fact at trial was whether the collision causing the

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[102] Id., at pp. 78a – 82a

[103] Appellee's Appendix at pp. 48b - 50b

[104] Appellant's Appendix at p. 182a

Ackermans' deaths occurred in the perpetration of the home invasion. The above special instruction greatly expands the timeframe for the completion of a home invasion; especially one where no separate felonies other than the initial breaking occurred. The above instruction would have been less confusing and more appropriate if this case involved a larceny or robbery where property was removed from the premises and not completely within defendant's dominion and control at the time police interrupted his partial escape.

IV. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF DEFENDANT'S PRIOR CONVICTION FOR FLEEING AND ELUDING UNDER MRE 404(b) BECAUSE THE CONVICTION WAS INTRODUCED IN THE PEOPLE'S CASE IN CHIEF WHERE DEFENDANT DID NOT TESTIFY FOR THE SOLE PURPOSE TO PROVE THAT THE DEFENDANT ACTED IN CONFORMITY THEREWITH

Standard of Review.

A trial court's decision on the admissibility of evidence is reviewed pursuant to the abuse of discretion standard.[105]

Defendant's Prior Conviction was Admitted for the Improper Purpose of Proving that he acted in Conformity with his Character.

MRE 404(b) limits the admissibility of character evidence, providing in relevant part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The proffered evidence is inadmissible if its only relevance goes to the defendant's character or his propensity to commit the offense. If the Prosecution can show that the evidence proves a fact other than character, the admissibility of the proffered evidence depends on whether its probative value outweighs its prejudicial effect, and considering the effectiveness of a limiting instruction in minimization of said prejudicial effect of such evidence.[106]

In reversing a defendant's drug conviction on the basis of a trial court's improper application of this evidentiary rule, this Court, in *People* v *Crawford*, held:

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[105] *People* v *Layher*, 464 Mich 756, 761 (2002); *People* v *Bohoda*, 448 Mich 21 (1995)
[106] *People* v *VanderVliet*, 444 Mich 52, 55 (1993)

> However, a common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been 'offered' for one of the rules's enumerated purposes. Mechanical recitation of 'knowledge, intent, absence of mistake, etc.', without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. Relevance is not an inherent characteristic...nor are prior bad acts intrinsically relevant to 'motive, opportunity, intent, preparation, plan,' etc. ...
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> ***
>
> In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. *(footnotes and citation omitted)*[107]

While the prior conviction and the charged offense do not need to be a part of a single continuing plot, a general similarity between the acts does not, by itself, establish a plan, scheme, or design. A "concurrence of common features" or a logical nexus is required between the charged and uncharged acts such that they are, "logically seen as part of a general plan, scheme, or design".[108] The prosecutor fails to establish its burden in this regard.

In this case, the prosecutor used MRE 404(b) in an impermissible fashion; as an evidentiary character assassination. There was overwhelming evidence that Defendant was involved in a fatal automobile accident and that it was his fault. Also, because he had amnesia of the events that occurred on May 24, 2001, Defendant was unable to testify at trial. Rather than reserving the prior conviction for purposes of rebuttal, the Prosecutor used it in their case in chief. The prejudicial effect of this evidence was compounded by the other errors committed by the trial court. These errors include failing to properly instruct the jury on the lesser included

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[107] 458 Mich 376, 387 (1998)
[108] *People* v *Sabin*, (aft rem), 463 Mich 43, 63-66 (2000)

offense of manslaughter and improperly instructing the jury on escape in the home invasion context under the felony-murder rule, all discussed above.

In addition to the compounding nature of the trial court's errors relative to the jury charges and the admissibility of Defendant's prior conviction, the prior conviction decision is reversible as it constitutes a prejudicial abuse of discretion, considering the court simply ignored the *Crawford* Court's admonition[109] to carefully assess the proffered reason for the prior conviction, the potential for abuse and confusion, and the lack in this case of a logical nexus between the charged crime of felony-murder, and Defendant's prior conviction.

Consider, for example, how the trial court treated this issue on the record just prior to making an evidentiary ruling that guaranteed Defendant an unfair and improper conviction for felony-murder:

> I have had all the assistance I need. I, I've been down this road many many times in considering this Court Rule. This is a Court Rule that has – I can't remember its genesis, but I don't recall spending a lot of time in law school when I was going to law school, but, you know, things have really changed so much in the law, criminal law, especially over the last- course of the last 25 years, and this, this Court Rule cuts against the criminals. It absolutely does cut against the one accused of a crime. I think the Prosecutor made a compelling argument to me relating to the –this issue, which I really don't fear based on the law that I know and the decisions that are coming down, especially on this 404, 404 will, will –would, would reverse my decision in denying your motion. So I –your motion's denied.[110]

As recognized by the trial court above, prior bad acts admitted under MRE 404 (b) are intrinsically adverse to individuals charged with criminal conduct and as such, the trial court must carefully weigh all four factors enumerated by the *Vandervliet* Court because, "the rule

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[109] *Crawford, supra* at p. 400

[110] Appellee's Appendix at pp. 24b, 25b

reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence."[111] Moreover, the Crawford Court also observed:

> [t]he problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can weigh too much with the jury and ... so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.[112]

In the instant case, the Prosecutor simply mechanically offered three of the usual laundry list of "proper" purposes for offering prior bad acts: knowledge, absence of mistake, and intent.[113] The crux of the "intent" portion of the argument was that since Defendant committed larceny in 2000, he had the intent to steal something from Mr. Albright's home upon his entry.

The problem with this analysis, however, is that the Prosecution did not charge Defendant with home invasion, larceny, or robbery but rather, he was only charged with felony-murder. Thus, the sole question for the jury to consider was whether the Ackerman homicides were committed in the perpetration of the home invasion felony. Defendant's intent to commit larceny was not at issue in this case. His intent to create a high risk of harm, including death, knowing that such harm or death would be a likely result from his actions was the intent at issue at this trial. Further, a reasonable juror could easily infer that Defendant's intent in the home invasion was to commit larceny once in the home. None of this brings the prior conviction into play; at least not for a legitimate purpose.

Similarly, the prosecutor's argument that the prior conviction was used to demonstrate lack of mistake is a red herring. Defendant did not dispute his involvement in the fatal automobile

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[111] *Crawford, supra*, at p. 384, citing *United States* v *Daniels*, 248 US App DC 198, 205; 770 F 2d 1111 (1985).
[112] Id, at p. 384, citing *Old Chief* v *United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), quoting *Michelson* v *United States*, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948).
[113] Appellee's Appendix at pp. 16b – 22b.

crash or that the Ackerman homicides was some mistake on his part. The only disputed issue was whether a continuous transaction of events occurred between the home invasion and the crash.

Finally in this regard, the Prosecutor asserted that since Defendant had previously suffered a crash when fleeing from police, he knowingly created a very high risk of death or great bodily harm. The facts surrounding the charged offense, however, differ markedly from those of the prior conviction. Mr. Albright testified that when he confronted Defendant, Gillis quietly left the home and walked to his vehicle, casually backing down the driveway. In the prior conviction, the homeowner testified that Defendant sped off. Also, Trooper Kramer testified that he observed nothing unusual about Defendant's speed when he first spotted his car and that during his pursuit, Defendant maintained a speed of no more than 5 mph over the speed limit. This compares to the Macomb Deputy Sheriff's testimony that Defendant sped around him and drove at speeds in excess of 80 mph. Trooper Kramer's testimony also suggests that Defendant may not have realized that he was traveling the wrong way down the expressway. Additionally, Defendant seemed to be avoiding oncoming traffic.

Despite these evidentiary inferences, a jury still could easily infer that going the wrong way on an expressway after committing a home invasion with police in pursuit evidences nothing if not that Defendant knowingly created a very high risk of harm by his actions. Thus, the Prosecutor's argument with regard to the "knowledge" purpose of admitting the prior conviction is misplaced.

Evidence of Defendant's Prior Police Chase Ending in a Crash was More Prejudicial than Probative.

Aside from these considerations, the Court of Appeals noted that the evidence of Defendant's previous police pursuit was more prejudicial than probative. This ruling was based on the fact that the evidence that Defendant drove in an unlawful manner was overwhelming. No additional evidence, especially the highly prejudicial and marginally relevant evidence of a prior police pursuit that led to an accident and subsequent conviction for fleeing and eluding, was necessary in this case. Admissibility of such evidence clearly violates the prejudicial balancing prong of the *Vandervliet* test.[114]

Our justice system requires that a defendant only stand trial for the crime charged, not for his or her past crimes or indiscretions. Whenever evidence of prior bad acts are admitted, there is a very significant risk that, rather than starting from a presumption of innocence, the fact finder will convict on the basis of the individual's bad character.

This was the primary concern of the Crawford Court:

> Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. Evidence of extrinsic bad acts thus carries a risk of prejudice, for it is antithetical to the precept that a defendant starts his life afresh when he stands before a jury...[115]

On intermediate appellate review of the question of admissibility of Defendant's prior bad acts, the Court of Appeals recognized the prejudice Defendant suffered from the admission at trial of the prior police chase. This problem, similar to the erroneous jury instructions, was compounded because the natural tendency upon hearing such evidence is to convict Defendant for something. Here, however, the only charge before them was to convict for felony-murder.

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[114] *Vandervliet*, *supra*, at p. 75.
[115] *Crawford*, *supra*, at p. 384.

V. THE COURT OF APPEALS, UNDER THE SEPARATION OF POWERS DOCTRINE, AND BASED ON THE FACTS OF THIS CASE, HAD THE AUTHORITY TO REMAND THIS CASE WITH INSTRUCTION TO THE LOWER COURT TO RETRY THIS CASE IN A MANNER THAT IS CONSISTENT WITH ITS OPINION

Standard of Review.

Defendant agrees with the Prosecutor that constitutional questions are reviewed de novo but disagrees with counsel that a constitutional issue is presented by the Gillis panel's decision in reversing the trial court with instruction.

The Court of Appeals has the Power to Remand a Case with Instruction to the Trial Court.

The Michigan Court of Appeals, the intermediate appellate court for the State of Michigan, was created by the Michigan Constitution in 1963 as part of the comprehensive reform of our civil procedure that accompanied the Revised Judicature Act of 1961, the adoption of the Constitution of 1963, and the promulgation of the General Court Rules, also in 1963.

The Michigan Court of Appeals has jurisdiction over all circuit courts as well as over appeals from some probate courts and state administrative bodies.[116] "The court of appeals is empowered to do just about anything in ruling on a matter before the court-subject, of course, to the substantive law and the power of the supreme court."[117] MCR 7.216 (A) provides that the Court of Appeals, "may at any time, in addition to its general powers, in its discretion, and on the temrs it deems just, grant any amendment that a trial court could have granted; allow or deny the grounds for appeal, or the record on appeal, to be amended; rearrange the parties; remand a case

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[116] MCL 600.308

[117] Gromek, *Michigan Appellate Handbook*, Institute for Continuing Education (1992), §2.3, p. 2-2.

with or without instruction; direct a lower court to enter an order or judgment; draw inferences of fact; tell the parties how to proceed; and dismiss an appeal.[118]

Each litigant at the circuit court that receives a final order has an appeal of right under the court rules. This right to appeal has caused a consistently high volume of cases to be lodged with the Court of Appeals over the past two decades.

The volume of cases at the intermediate court in Michigan is well known to this Court. One result of this high case volume is that, on occasion, the written opinions are truncated to the point that the language used may not be optimal in getting across, in basic message of a panel's decision.

In this case, the *Gillis* panel reversed the lower court's decision to quash the felony-murder information, holding that the Ackerman homicides "were not a part of the continuous transaction of or immediately connected to the home invasion."[119] The Court of Appeals further held that the homicides, however, were immediately connected to Defendant's act of fleeing and eluding the police.[120] The Court of Appeals therefore quashed Defendant's convictions and sentences for felony-murder, and remanded the case with instruction, as it was expressly empowered to do pursuant to MCL 600.308 and MCR 7.216 (A) (7) and (9). In remanding this case to the trial court with instruction, the Court of Appeals used offending and arguably imprecise language, "[a]ccordingly, we remand to the trial court for a *new trial* on those charges," [121] rather than its usual phrase, "remanded to the trial court for the entry

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[118] Id.
[119] Appellant's Appendix at p. 13a; *Gillis*, slip opinion, at p. 3.
[120] Id.
[121] Id.

Law of the Case Doctrine Prohibits a Trial Court from Deciding an Issue in the Case Differently on Remand than the Court of Appeals.

On remand, the law of the case doctrine precludes a trial court from addressing, revising, or modifying issues of law that were addressed by the Court of Appeals.[122] The Fisher Court held that "[t]he power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." [123] The *Fisher* Court also stated the inverse proposition such that the doctrine of the law of the case has no application where a case is remanded without directions to the lower court; in such a case the lower court would enjoy the same power as if it made the ruling itself.

In this case, the offending language can be interpreted to mean that on remand, if the Prosecutor elects to recharge Defendant with felony-murder, Defendant's motion to quash will prevail by operation of the law of the case, as a matter, unless of course this Court modifies the decision of the Court of Appeals.

[122] *People* v *Fisher*, 449 Mich 441, 444-45 (1995)
[123] Id., at p. 447

RELIEF REQUESTED

WHEREFORE, your Appellee respectfully requests this Honorable Court, for the reasons and based on the authority set forth herein, grant the following relief:

A. Affirm the holding of the Court of Appeals in this matter on the grounds that the plain language of MCL 750.316 precludes a charge of felony-murder, as a matter of law, unless the homicide is part of a continuous transaction with, or is otherwise immediately connected with a completed home invasion;

B. Hold that a homicide is not part of a continuous transaction with, or is otherwise not immediately connected with a completed home invasion where the defendant has completed an escape from the invaded dwelling and, the defendant embarks on a separate and distinct felony subsequent to the completion of the home invasion;

C. Affirm the Court of Appeals and hold that under the facts of this case, the trial court reversibly erred by failing to instruct the jury as to voluntary and involuntary manslaughter;

D. Hold that under the facts of this case, the special instruction on escape constituted reversible error;

E. Affirm the Court of Appeals holding that it was prejudicial and thus reversible error for the trial court to allow prior bad acts involving both Defendant's prior fleeing and eluding and conviction and the police chase leading to said conviction;

F. Hold that the Court of Appeals did not violate the separation of powers doctrine by remanding this case for a new trial to be conducted consistent with the law of the case doctrine; and

G. Grant such other rulings and relief as this Honorable Court deem appropriate and just under the circumstances of this case.

Respectfully submitted,

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